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No. 96-573

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

FLORIDA LEAGUE OF
PROFESSIONAL LOBBYISTS, INC.,
Petitioner,

vs.

WILLIAM N. MEGGS, as State Attorney for the
Second Judicial Circuit of Florida,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.
(Restated)

Whether Chapter 93-121, Laws of Florida, requiring the reporting of expenditures made for the purpose of lobbying by lobbyists or their principles and the sources of funds for such expenditures, violates the First Amendment, United States Constitution.

II.
(Restated)

Whether Chapter 93-121, Laws of Florida, violates the First Amendment, United States Constitution, by prohibiting a person from paying a fee to a lobbyist that is contingent on any specific legislative or executive branch action.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 87 F.3d 457. The opinion of the district court (Pet. App. 14-27) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1996. The petition for a writ of certiorari was filed on October 7, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioner, the Florida League of Lobbyists, Inc. (the "League"), seeks review of a decision of the court of appeals affirming the district court's entry of summary judgment in favor of the respondent, William N. Meggs, State Attorney. Respondent Meggs, a prosecuting attorney, was sued as a nominal representative of the state. This case did not arise in the context of any attempt at prosecution, either by the Florida Legislature or respondent Meggs.

The League's complaint in this action challenged the constitutionality of Chapter 93-121, Laws of Florida, and sought declaratory and injunctive relief. Count I asserted the recordkeeping requirements for reporting of lobbying expenditures were costly and burdensome and were not supported by a compelling governmental interest. Count II alleged that the requirement that a lobbyist disclose his principal's identity was likewise not supported by a compelling governmental interest. Count III raised essentially the same claim with respect to the prohibition on contingency fees.

The district court, based upon the representations of the League's counsel, ruled that the League had presented a facial challenge *only* to the constitutionality of Chapter 93-121 and determined that the issues were ripe for summary judgment. On cross-motions for summary judgment the district court upheld the facial validity of Chapter 93-121 and granted summary judgment in favor of respondent. The court of appeals also perceived the challenge as one to facial validity, noting that the League had "failed to allege a specific unconstitutional application" of the reporting requirement. (Pet. App. 4)

The parties did submit affidavits to the district court with respect to the burdensome nature of the reporting requirements. The district court's ruling pointed out that the League's evidence contained only estimates of what it would cost to comply with the

reporting requirements and that it completely failed to show that the burden of compliance would deter individuals from exercising their First Amendment rights. (Pet. App. 24) The district court also found a similar defect with respect to the League's assertion that some persons would be discouraged from exercising their right to lobby if they could not do so through a contingency fee arrangement, noting a complete lack of evidence to support the argument. (Pet. App. 27)

The respondent provided to the district court affidavits describing how lobbyists seek to "indirectly" influence the legislative process by orchestrated letter writing and media campaigns, the provision of reports and studies researched and prepared by lobbyists or their principals, and the pervasive efforts to garner goodwill with free entertainment, food, beverages and other tangible items. The League made no effort to prove that the state's interests in evaluating the scope of such indirect pressures are any less compelling than its interests in the financing of more direct and personal communications.

ARGUMENT

The reporting requirements of the law at issue apply only to professional lobbyists, that is, those who are paid by a principal to influence or attempt to influence legislative or executive branch lobbying. *See* section 11.045(1)(e), (f) and (g), Fla. Stat. (1995) (Pet. App. 28) (provisions applicable to the legislative branch).[1] The League, as the district court found, completely failed to show that the reporting requirements were unduly burdensome or onerous. Thus, the League argued below, and now argues in this Court, that a hired lobbyist cannot constitutionally be required to disclose any expenditure intended to influence legislation unless that expenditure was made in support of a direct oral or written communication between a lobbyist and a legislator. According to the League, neither the legislature itself nor the citizens of the state can have a compelling interest in identifying the amounts and sources of the vast sums lobbyists or their principals expend to influence government action in the absence of direct conversation between a lobbyist and a legislator (or executive branch official).

The court of appeals properly rejected the League's facial challenge to Chapter 93-121. The decision of the court of appeals is correct and does not conflict with any decision of this Court. Nor does the League's petition argue conflict with any decision of a federal court of appeals or the supreme court of any state. Further review is not warranted. *See* Rule 10, Rules of the Supreme Court.

I. CHAPTER 93-121, LAWS OF FLORIDA, DOES NOT VIOLATE THE FIRST AMENDMENT BY REQUIRING A LOBBYIST OR HIS PRINCIPAL TO REPORT ALL EXPENDITURES MADE FOR THE PURPOSE OF LOBBYING AND THE SOURCE OF FUNDS FOR SUCH EXPENDITURES.

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[1]Section 112.3215(1), Fla. Stat, contains corresponding provisions applicable to the executive branch. (Pet. App. 35 et. seq.)

In recent years this Court has repeatedly recognized the deterrent effect of disclosure laws on corrupt political practices and the interest of the public in knowing the identity of those who expend money to support candidates and the amounts spent. *See Buckley v. Valeo*, 424 U.S. 1, 64-72 (1976); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978); *McIntyre v. Ohio Elections Commission*, 115 S.Ct. 1511, 1522-1523 (1995). The Court has described the government's interests in disclosure as "substantial" and found them weighty enough to survive strict scrutiny, at least in the context of a facial challenge that fails "to demonstrate injury of the sort at stake in *NAACP v. Alabama*, [357 U.S. 449 (1958)]." *Buckley, supra*, at 68, 70. *Buckley* plainly stated that disclosure requirements were "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.* at 68.

The interests identified in these cases differ not at all from the interests of legislators and members of the public in being informed about the source and flow of lobbyists' money, money that is by definition intended to influence legislative or executive action. *See United States v. Harriss*, 347 U.S. 612, 625 (1954). Whether or not the *Harriss* decision used precisely the same terminology forty years ago, the interests at issue here are clearly compelling.

Indeed, both courts below found that the interests of the State of Florida were compelling and that the League did not dispute this point. (Pet. App. 8,9,19) The district court expressly found that the League had adduced *no* evidence comparable to that which rightly troubled this Court in *NAACP v. Alabama*. (Pet. App. 23-24) The League's argument is therefore plainly inadequate. In sum and substance it asserts that if only the court of appeals had applied strict scrutiny to Chapter 93-121 it would necessarily have found the reporting requirements unconstitutional. In fact, both lower courts did consider that standard and found a complete lack of evidence--such as was adduced in *NAACP v. Alabama*--that would suffice to override the state's compelling interests in

disclosure.

Thus, having failed to show that the disclosure requirements seriously infringed the First Amendment rights of lobbyists or principals, the League has broadly asserted that there is no compelling state interest in what it terms "indirect" lobbying. By this it means activities *intended* to influence legislative or executive action that do not involve a "direct" communication between a lobbyist and a legislator or executive official. (Pet. p.11) The court of appeals quickly dispensed with this illogic:

> [T]he government interest in providing the means to evaluate these pressures may in some ways be stronger when the pressures are indirect, because then they are harder to identify without the aid of disclosure requirements. *Harriss* appears to have acknowledged as much when, even reading the statute narrowly to apply only to "direct communication," it nonetheless defined direct communication to include "artificially stimulated letter campaign[s]." *Harriss*, 347 U.S. at 620, 74 S.Ct. at 813.

(Pet. App. 9)

In addressing the League's facial challenge, the court of appeals did not, as the petition suggests, impose some inappropriately high burden of persuasion. It was not necessary in this case for the court to even decide whether the League's burden was to show the law unconstitutional in *all* applications, *most* applications, or some *"large fraction."* (Pet. App. 5) As the court of appeals correctly concluded, the League failed to meet any of these standards. In fact, at no time has the League identified even one instance in which the reporting requirements of Chapter 93-121 would likely be held unconstitutional.

This failure is illustrated by the League's near total reliance on

McIntyre v. Ohio Elections Commission, 115 S.Ct. 1511 (1995), in support of its facial challenge. For the League to contend that *McIntyre* "applies verbatim" to the statute at issue here (Pet. pp.7-8) only underscores the weakness of its case. In *McIntyre* this Court struck down an Ohio law that prohibited the distribution of anonymous campaign literature, which the decision characterized as "core political speech." The Court was careful to distinguish its earlier disclosure rulings in *United States v. Harriss* and *First Nat. Bank of Boston v. Bellotti*, *see* 115 S.Ct. 1522, n.18, and, with particular relevance to this case, stated:

> Our reference in the *Bellotti* footnote to the prophylactic effect" of disclosure requirements cited a portion of our earlier opinion in *Buckley*, in which we stressed the importance of providing the "electorate with information 'as to where political campaign money comes from and how it is spent by the candidate.'" 424 U.S. at 66. We observed that the "sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." *Id.* at 67. Those comments concerned contributions to the candidate or expenditures authorized by the candidate or his responsible agent. *They had no reference to the kind of independent activity pursued by Mrs. McIntyre. Required disclosures about the level of financial support a candidate has received from various sources are supported by an interest in avoiding the appearance of corruption that has no application to this case.*

115 S.Ct. at 1522-23 (emphasis added)

Nevertheless, relying on *McIntyre*, the League asserts the Florida law is flawed because lobbyists would have to report

expenditures on media advertising and publications. (Pet. at 9) Such expenditures are reportable if the intended purpose of the advertising or publication is to influence legislation, but this requirement in no way offends the rationale of *McIntyre*. The League ignores *McIntyre's* careful distinction between a handbill's "personally crafted statement of a political viewpoint" and the "disclosure of an expenditure and its use." *Id.* at 1523.

The League also complains of other imagined applications of the disclosure requirement:

> An organization which employs a lobbyist cannot research, print or distribute a flyer or newspaper advertisement, or send letters to its membership discussing legislative action on a matter without reporting all covered expenses.
>
> If an organization which has hired a lobbyist has a meeting of its officers or membership at which efforts to influence legislation are discussed, all organizational expenses relating to the meeting must be recorded and reported.

(Pet. at 11)

Again, expenditures for research, flyers, advertisements or letters are reportable only if these items are intended to influence legislative action. Moreover, the term "organizational expenses" is one of the League's invention. A joint rule adopted by the Florida Legislature would exempt most such expenses. Both of these examples were argued to the lower courts and neither was found to merit discussion.

The court of appeals and the district court understood that *Harriss*, despite its language about "direct" communications, did not support the extremely restrictive application the League demands for the Florida law. (Pet. App. 9,21) *Harriss* expressly

acknowledged that direct communication would include "artificially stimulated letter campaigns" or pressures exerted by a lobbyist's "hirelings." 347 U.S. at 620. The League's retrograde interpretation of *Harris* is not only plainly inconsistent with this language but is wholly at odds with the Court's more recent pronouncements in *Buckley, Bellotti* and *McIntyre*.

Furthermore, *Harris* involved a criminal prosecution and the real issue was whether the federal lobbying act could withstand a vagueness challenge. The question this Court addressed was *who* were the persons to whom the act could constitutionally apply, not the lobbying expenditures required to be reported. Unlike the Florida law, §307 of the federal act was not by its terms limited to professional lobbyists--that is, only those persons hired and paid to influence legislation. Section 307 and the reporting requirements of §305 applied to "any person" who might collect or receive money that would even "indirectly" aid in or influence the passage of legislation. As written, the criminal sanctions of the federal act applied equally to those who were not hired lobbyists but who merely sought to exercise their First Amendment rights to engage in or stimulate public debate. Hence, the *Harriss* decision limited the application of the federal act to persons engaged in

> "'lobbying in its commonly accepted sense'"--to direct communication with members of Congress on pending or proposed federal legislation. *The legislative history of the Act makes clear that, at the very least, Congress sought disclosure of such direct pressures, exerted by the lobbyists themselves or through their hirelings or through an artificially stimulated letter campaign. It is likewise clear that Congress would have intended the Act to operate on this narrower basis, even if a broader application to organizations seeking to propagandize the general public were not permissible.*

347 U.S. at 620-621 (emphasis added) (footnotes omitted). It is obvious that *Harriss* intended only to foreclose application of the federal act to individuals or organizations who sought to influence public opinion, not to restrict the power of Congress to inform itself about the calculated activities of hired, professional lobbyists.

In view of the record of this case, the League's assertion that the court of appeals "fashioned a new, far more forgiving test for First Amendment analysis of content based laws" states no issue at all. The Florida law is neutral as to viewpoint. To the extent it is "content based" it is like numerous other disclosure laws this Court has approved that work to shed some light on money in the political process. Under *Buckley* and other cases the government's interest in such laws is compelling and will yield, if at all, only in the face of evidence of the sort proffered in *NAACP v. Alabama*. *Buckley*, 424 U.S. 68-72. There is no such evidence in this case and therefore no reason to grant the writ. There is nothing to review.

II. CHAPTER 93-121 DOES NOT VIOLATE THE FIRST AMENDMENT BY PROHIBITING A PERSON FROM PAYING A FEE TO A LOBBYIST CONTINGENT ON SPECIFIC LEGISLATIVE OR EXECUTIVE BRANCH ACTION.

This Court and many others have long treated fee agreements that are contingent on procurement of government favors as contrary to public policy and unenforceable. As this Court said almost a century and a half ago:

> [T]he decisions have not turned upon the question whether improper influences were contemplated or used, but upon the corrupting tendency of the agreements. . . . Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the

> end desired. The law meets the suggestion of evil, and strikes down the contract from its inception.
>
> There is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of elements to control the action of both, is the direct and inevitable result of all such arrangements.

Providence Tool Co. v. Norris, 69 U.S. 45, 17 L.Ed. 868, 870-871 (1864). Over forty years later, Justice Holmes, in a similar decision, reiterated that "the objection to [such agreements] rests in their tendency, not in what was done in the particular case." *Hazelton v. Sheckels*, 202 U.S. 71, 79 (1906).[2]

This Court has rendered no decision in the intervening years that would cast doubt on *Providence Tool Co.* or *Hazelton*, nor has it suggested that any legislative effort to prohibit such agreements should be subject to an evidentiary trial. The latter point is one of common sense:

> The court will not inquire what was done. If that should be improper, it probably would be hidden, and would not appear.

Hazelton, 202 U.S. at 79. Nothing has happened since 1864 to change the "tendency" of contingency fee agreements, and the respondent should not be held to offering evidence of what is generally hidden.

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[2]Florida's case law follows the *Providence Tool Co.* decision. *See Wechsler v. Novak*, 26 So.2d 884 (Fla. 1946); *City of Hialeah Gardens v. John L. Adams & Co.*, 599 So.2d 1322 (Fla. App.), *rev. denied*, 613 So.2d 5 (Fla. 1992). Research the respondent presented to the district court indicated that at least 34 states in addition to Florida ban contingency fee lobbying.

Ignoring this historic and pervasive policy, the League contends that "the expenditure of money is a form of expression," and, this being so, the ban on contingency fees for lobbyists cannot survive strict scrutiny. The few cases cited lend no support to this argument.

United States v. National Treasury Employees Union, 115 S.Ct. 1003 (1995), actually supports Florida's restriction. The federal law at issue in that case banned speaking and writing honoraria not only for members of Congress and high officials, but also for rank and file government employees. The government had no evidence of misconduct as to this latter group.[3] In the absence of such evidence, the Court held that Congress could not restrict the speech of lower level government employees "with negligible power to confer favors on those who might pay to hear them speak or to read their articles." *Id.* at 1016. On the other hand, the Court stated that Congress could reasonably assume that payments of honoraria to judges or high-ranking officials in the Executive Branch might generate [the] appearance of improper influence." *Id.* The Florida legislature was at least as justified in acting as it did not only because of the appearance of improper influence that contingency fee agreements present but also because of their long-recognized corrupting tendencies.

The League's reliance on *Meyer v. Grant*, 486 U.S. 414 (1988), and *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), is similarly misplaced. Neither case dealt with a prohibition on contingency fee lobbying, much less the

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[3]This Court described the activities of the rank and file employees in these words:

> The speeches and articles for which they received compensation in the past were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment.

115 S.Ct. at 1013.

considerations that bear on potential corruption of the lawmaking process. *Meyer v. Grant* concerned a complete prohibition on paying anyone to circulate petitions proposing state constitutional amendments. Chapter 93-121, however, does not prohibit compensating lobbyists; it prohibits only one narrow form of compensation, contingency fee arrangements. The League has not adduced the first bit of evidence to establish that contingency fee payments are necessary for anyone.

The *Riley* case reflects this Court's concern with a state's attempt to impose unwanted speech upon professional fund raisers engaged in charitable solicitations, *i.e.*, to require such persons to disclose to potential donors the average percentage of gross receipts actually turned over to charities. The law in question also imposed presumptive limitations on the percentage of receipts deemed reasonable for fund raisers to retain. The Supreme Court found, *inter alia*, that the statute was not narrowly drawn to achieve its goal of setting reasonable fees. Chapter 93-121 does not attempt to regulate the amount a lobbyist may charge a principal or set presumptively reasonable fees. The law is narrowly drawn in that it regulates only that fee arrangement that is most likely to have a corrupting tendency and to impair the integrity of the lawmaking body or executive officials.

The League has failed to show that contingency fee agreements are essential to anyone's right to present his views to the legislature or that the law precludes reasonable payment for a lobbyist's services when rendered. Given the historically recognized effects of such agreements, it can hardly be said that the prohibition is so problematic that it must be held facially unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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